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IN THE

Supreme Court of the United States

October Term, 1964

No. 279

JOHN PAPALIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, John Papalia, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on June 19, 1964.

Citations to Opinions Below

There was no opinion in the District Court. The decision denying petitioner's motion for relief is printed in Appendix A and is not reported officially or unofficially. The opinion of the Court of Appeals is printed in Appendix B and is not officially reported at this time.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on June 19, 1964. The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1254(1).

Questions Presented

1. Whether a terse comment by the District Court summarily granting the Government's motion to dismiss the petition after a hearing may be substituted for findings of fact and conclusions of law as required by Title 28 U. S. C., Section 2255 in view of the cases decided by The Supreme Court of the United States and the Courts of Appeals of other circuits requiring formal findings as to each issue raised by the parties as opposed to the statement of a conclusion or inference which could possibly be drawn from the evidence?

2. Whether the Court of Appeals of the Second Circuit in allowing the District Court to dispense with formal findings of fact and conclusions of law after a hearing on a motion pursuant to Title 28 U. S. C., Section 2255 sanctioned a judicial disregard of a Congressional statutory mandate and placed an affirmative burden on the petitioner seeking relief to request that the court perform its duty as set forth by said statute?

3. Whether the mere denial of the petitioner's motion can be construed as a finding that upon all the evidence presented at the hearing the petitioner was mentally competent, within the rule promulgated by The Supreme Court

of the United States, and whether upon said evidence it can be stated that the petitioner made an intelligent and understanding waiver of his constitutional rights?

Statutes Involved

1. Title 28 United States Code, Section 2255.

2. Federal Rules of Criminal Procedure, Rule 32(d).

The text of the Statute and Rule are printed *infra* in Appendix C and Appendix D.

Statement

The petitioner herein on the 12th day of February, 1964, moved in the District Court for the Southern District of New York for an order permitting him to withdraw his plea of guilty to Counts 1, 14 and 30 of Indictment No. 61 CR 527 which charged him with violations of the Narcotics Laws of the United States, or in the alternative to vacate and set aside the sentence imposed upon him pursuant to Title 28, United States Code, Section 2255. The grounds for said motion were that the petitioner was mentally incompetent to either plead or be sentenced.

A hearing was held before the Honorable Lloyd F. MacMahon in the United States District Court for the Southern District of New York on the 19th day of March, 1964. The motion was denied at the end of the petitioner's case (see Appendix A). A notice of appeal was filed on March 29, 1964. On June 19, 1964, the Court of Appeals for the Second Circuit in a *Per Curiam* decision affirmed the decision of the District Court (see Appendix B).

At the hearing in the District Court, the petitioner presented various witnesses on his behalf including two

physicians who are eminent specialists in chest diseases with emphasis on tuberculosis, another physician who is a neuropsychiatrist, his brother, a radio newscaster, and the petitioner himself. These witnesses brought out the fact that the petitioner was suffering from acute tuberculosis and from August 30, 1962 until March 11, 1963, the day that the petitioner was sentenced, he was being treated with a drug known generically as Isoniazid, hereinafter referred to as "I.N.H.".

During the course of the hearing, the evidence revealed that the drug "I.N.H." is capable of causing toxic delirium, periodic amnesia and memory lapses. In addition to this, other side effects included depression and itching and scratching. The medical testimony also pointed up the fact that a person suffering from these side effects could appear perfectly normal and rational to others around him and that he could enter a plea of guilty without being aware of it.

Evidence that the petitioner was suffering from the adverse effects of this drug was presented in the form of the medical record of his treating physician which listed his mental condition at times as "depressed", and "quite depressed, looked rather dishevelled and lost interest in food". Testimony of the petitioner himself showed vague recollections and confusion regarding the period in question. Additional testimony of the petitioner's brother and the news director of Radio Station CHML in Hamilton, Ontario, Canada, tended to confirm the fact that the petitioner was not rational at the times that he pleaded guilty and was sentenced. The petitioner did not remember these events.

The motion was denied without proof being submitted on behalf of the Government.

Reasons for Granting the Writ

This case is one that, without doubt, requires review by the Supreme Court of the United States. Issues were presented in the Court of Appeals for the Second Circuit which are of the utmost importance and the decision rendered shows that said court is directly in conflict with the Courts of Appeals of other circuits and of this Court as to basic issues. In fact it appears that the interpretation given to the rights of the petitioner under Title 28 United States Code, Section 2255 by the Second Circuit is completely erroneous.

The hearing of the case at bar lasted approximately two and one-half hours. During that time much technical medical evidence was presented in addition to evidence tending to show the petitioner's poor mental condition and his utter state of confusion at the time he took his plea and was sentenced. The District Court then completely ignored the mandate of the aforementioned statute and denied the petitioner's motion with what amounts to a wave of the hand. The United States Court of Appeals for the Second Circuit in effect condones this manner of handling the case by affirming the decision.

One is utterly dismayed at the actions of the two learned courts below. The Courts of Appeals of the Seventh and Eighth Circuits, in decisions cited *infra*, have followed the lead of the Supreme Court of the United States and have required, without a motion made on behalf of the petitioner, formal findings of fact and conclusions of law as a necessary prerequisite to dispose of a motion of this sort after a hearing. This is in fact nothing more than comply-

ing with a statutory mandate which the Second Circuit does not seem to hold important.

This learned body has also set up standards and guidelines in well reasoned opinions, cited *infra*, delineating exactly what constitutes mental competency or incompetency. These tests concisely show how the various District Courts and Courts of Appeals are to proceed in cases of this sort. It certainly cannot now be said that the courts below followed these standards.

It is respectfully submitted that if this decision is allowed to stand and the procedure and method of complying with the statute in question is approved, the very foundation of our judicial system which guards the basic rights of the individual will be weakened beyond repair.

POINT I

The determination by the Court of Appeals with respect to findings of fact and conclusions of law was clearly erroneous and in direct conflict with decisions in other circuits.

The issue was set forth clearly and succinctly by Bazelon, Circuit Judge, in his dissenting opinion. *Bishop* v. *United States*, 223 F. 2d 582, 588. In taking the majority of the court to task for not holding to the mandate of Section 2255 in regard to filing findings of fact, he wrote:

> "The court reaches affirmance by holding that an ultimate determination on the issue of mental competency to stand trial arises 'directly from the evidence without the interposition of separate supporting findings'. I think this holding erroneous and contrary to

decisions in other circuits. The elimination of Section 2255's requirement for findings in this case seriously endangers the administration of the statute.

"Section 2255 directs 'Unless the motion and the files and records conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and *make findings of fact and conclusions of law with respect thereto* * * *'

"'The issue was competency' as this court says 223 F. 2d 587. This court holds that the trial court need only determine the issue. The statute says it must determine the issue *and* make findings of fact * * *"

The learned Circuit Judge's dissent was well taken. In *United States* v. *Cook*, 7 Cir. 1953, 208 F. 2d 114, 115 and *Michener* v. *United States*, 8 Cir. 1949, 177 F. 2d 422, both courts held that it was erroneous for the trial court to deny petitioner's motion to vacate judgment after a hearing without findings of fact and conclusions of law having been made. This view was also apparently adopted by the Supreme Court of the United States. *Bishop* v. *United States*, certiorari granted and case remanded to District Court, 350 U. S. 961, 100 L. Ed. 835, 76 S. Ct. 440.

The case law cited *supra* has been completely ignored by the Court of Appeals for the Second Circuit. In interpreting the meaning and intent of Section 2255 the aforementioned court substituted its own thought processes for that of the trial court and indulged in verbal gymnastics to uphold the action of said court. In one paragraph it refers to the District Court's concluding statement as a finding and proceeds to discuss it as such. In the next paragraph the very same statement is called a "conclusion [which] is not clearly erroneous".

It appears from the above cited authorities that with regard to Section 2255 and its mandatory provisions, the Second Circuit is without the mainstream of judicial thinking, is in direct conflict with other circuits and condones departure, at least in this instance, from accepted judicial standards. See *United States* v. *Hayman*, 342 U. S. 205, 72 S. Ct. 263, 96 L. Ed. 232; *Carnes* v. *United States*, 10 Cir. 1960, 279 F. 2d 378, 380.

POINT II

The District Court and Court of Appeals, Second Circuit, ignored the test of competency as set forth by the Supreme Court of the United States and failed to make a specific finding in regard to same as of the time the petitioner took his plea and was sentenced.

As it has been pointed out to this learned Court, *supra*, the Court of Appeals for the Second Circuit in its opinion has indicated that no findings of fact and conclusions of law are necessary, yet it has supplied these essential items for the District Court. In so doing the *Circuit Court* has twice stated that the petitioner was mentally competent. In one paragraph it stated

> "• • • Papalia was mentally competent at the time of his plea and sentencing. • • •"

In the next paragraph the *Circuit Court* said,

> "• • • Papalia did not sustain his burden of proving that he was not mentally competent. • • •" (Note the negative language.)

In *Dusky* v. *United States*, 362 U. S. 402, 4 L. Ed. 824, 80 S. Ct. 788, the standard which was to be used in determining mental competency was set forth clearly and concisely. The court stated:

> "• • • It is not enough for the district judge to find that 'the defendant is oriented to time and place and has some recollection of events' but that the 'test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him'."

It seems perfectly obvious that when the various District Courts and Circuit Courts of Appeals have occasion to decide this issue, that test must be used. Indeed, District Courts within the Second Circuit have applied this test in cases similar to the one at bar. See *United States* v. *Hock*, E. D. N. Y., 1963, 224 F. Supp. 870; *Sullivan* v. *United States*, S. D. N. Y., 1962, 205 F. Supp. 545, 551. The decision below though, inferentially holds that in this Circuit the *Dusky* case, *supra*, arbitrarily may or may not apply when mental capacity is the issue depending upon the case and the surrounding circumstances. A situation such as this cannot be left unresolved.

It is fundamental that when one pleads guilty to a crime, that person is waiving basic constitutional rights. Thus, at the time said plea is entered the normal procedure that the District Judge will follow is to put various questions to the defendant in the presence of counsel. These questions are designed so that there can be no doubt as to whether or not he is fully aware of the import and gravity of his act. Courts may not allow anything less than a plea volun-

tarily made after proper advice with full understanding of the consequences. *Kercheval* v. *United States*, 274 U. S. 220, 223, 71 L. Ed. 1009, 47 S. Ct. 582.

This Court recognizes that although proceedings along the aforementioned lines may appear regular, it still might be that the petitioner (accused) did not make an intelligent and understanding waiver of his constitutional rights. *Sanders* v. *United States*, 373 U. S. 1, 19, 20, 10 L. Ed. 2d 148, 83 S. Ct. 1068. Thus the reason for the test as enunciated in *Dusky*, *supra*, is well founded. An accused must be in full command of his faculties when entering a plea, and upon the hearing of a motion under Section 2255, the court must make such a specific finding.

The District Court in this case denies the motion and as an afterthought states,

"The case is a tissue of lies from A to Z."

The Court of Appeals then in effect states that the District Court was correct. This decision implies that: (1) The statement was to be considered as findings of fact and conclusions of law; (2) The statement also meant that the petitioner met the test of mental competency at the time he pleaded guilty; and (3) The petitioner by entering said plea intelligently and understandingly waived his constitutional rights.

Absurd as this may sound, this is the import of the court's ruling.

Conclusion

It is therefore prayed that this petition for a writ of certiorari be granted.

Respectfully submitted,

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Appendix A

Opinion and Decision of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 489—September Term, 1963.

(Argued June 3, 1964 Decided June 19, 1964.)

Docket No. 28890

JOHN PAPALIA,

Petitioner-Appellant,

—*v.*—

UNITED STATES OF AMERICA,

Appellee.

Before:

MOORE, KAUFMAN and HAYS,

Circuit Judges.

Appeal from judgment of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*, denying petitioner's motion to withdraw a guilty plea, Fed. R. Crim. P. 32(d), or in the alternative to vacate the sentence, 28 U. S. C. §2255 (1958).

Judgment affirmed.

Appendix A

ARTHUR ADDESS of BOBICK & DEUTSCH, New York City, *for Petitioner-Appellant.*

MICHAEL W. MITCHELL, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney, and Bernard W. Nussbaum, Assistant United States Attorney, on the brief), *for Appellee.*

PER CURIAM:

Eleven months after sentencing, petitioner, John Papalia, moved to withdraw his plea of guilty, Fed. R. Crim. P. 32(d), or in the alternative to vacate the sentence, 28 U. S. C. §2255 (1958), on the ground that at the time of the plea and sentencing he "was mentally incompetent to either plead or be sentenced." After hearing the testimony of Papalia and his supporting witnesses, the district judge summarily granted the government's motion to dismiss with the terse comment, "The case is a tissue of lies from A to Z." On this appeal Papalia claims (1) that the district judge erred in failing to make specific findings of fact and conclusions of law and (2) that, on the evidence presented at the hearing, he was entitled to relief.

Although Papalia made no request below for formal findings of fact and conclusions of law, he contends here that the failure to make such findings violated 28 U. S. C. §2255 (1958) which provides:

> "Unless the motion and the files and records of the case conclusively show that the petitioner is entitled to no relief, the court shall cause notice thereof to be

served upon the United States attorney, grant a prompt hearing thereon, determine the issues *and make findings of fact and conclusions of law with respect thereto* * * *" (Emphasis added.)

But the district judge's comment clearly indicated the court's essential findings that Papalia's story was unworthy of belief and that Papalia was mentally competent at the time of his plea and sentencing. Although fuller findings might have been helpful, we cannot say that Papalia has been prejudiced by their absence. See *Rossiter* v. *Vogel*, 148 F. 2d 292, 298 (2d Cir. 1945); *Huard-Steinheiser, Inc.* v. *Henry*, 280 F. 2d 79, 84 (6th Cir. 1960); 5 Moore, Federal Practice ¶52.06[2] (2d ed. 1951).

Papalia's contention that on the evidence presented at the hearing he was entitled to withdraw his guilty plea is only a disagreement with the district judge's conclusion. We have examined the evidence and hold that the district judge's conclusion is not clearly erroneous. Papalia did not sustain his burden of proving that he was not mentally competent when he entered his guilty plea and was sentenced. See *Holmes* v. *United States*, 323 F. 2d 430 (7th Cir. 1963), cert. denied, 376 U. S. 933 (1964); *United States* v. *Harris*, 211 F. Supp. 771 (S. D. Fla. 1962), aff'd 316 F. 2d 229 (5th Cir. 1963).

Affirmed.

Appendix B

Decision by MacMahon, D. J.

(116)

Mr. Bobick: The petitioner rests, your Honor.

Mr. Gold: At this time, your Honor, the government moves to dismiss the motion on the ground that the burden of proof has not been met.

The Court: Granted as to both motions. The case is a tissue of lies from A to Z.

Mr. Bobick: Your Honor, is that comment on the record?

The Court: Yes.

Appendix C

Statute Involved

Title 28, United States Code

§2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Appendix D

Rule Involved

Federal Rules of Criminal Procedure

Rule 32(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 279

JOHN PAPALIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 13-15, Vol. 11, 36-38)[1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1964 (Vol. II, 39). The petition for a

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[1] The certified record is in three parts. Vol. I is appellant's appendix below. Vol. II is the government's appendix below and proceedings in the court of appeals.

writ of certiorari was filed on July 15, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court's denial (following a hearing) of petitioner's motion to vacate sentence on his plea of guilty should be set aside for failure to enter detailed findings of fact.

STATEMENT

In March, 1963, in the United States District Court for the Southern District of New York, petitioner, who was represented by counsel, pleaded guilty, after trial had commenced, to three counts charging violations of the narcotic laws. A week later, he was sentenced to imprisonment for ten years (Vol. I, 16-17).

On February 17, 1964, petitioner filed a motion to vacate his sentence or withdraw his plea of guilty, alleging that, as the result of taking drugs, he was mentally incompetent both at the time of the plea and of the sentence (Vol. I, 1-2). In his affidavit he alleged that he had been taking drugs for the treatment of a tubercular condition prior to the time of plea and sentence; that the drugs produced a state of euphoria or depression during which he could not remember to any extent what had happened; and that he was in such a state at the time he pleaded guilty and was sentenced. He alleged that during the period in which he took the drugs he complained to his physician, Dr. Gross, of a feeling of giddiness for substantial periods of time (Vol. I, 10-11).

At the hearing on the motion, petitioner testified that he could not recall pleading guilty or being sentenced; and that while he recalled speaking to his attorney during 1962, he had no recollection of appearing in court with counsel in March, 1963. He said he first discovered that he had pleaded guilty when he was in Federal Detention Headquarters prior to being sent to a penitentiary, but that he did not attempt to communicate with his lawyer or anyone else at the time. Petitioner's brother testified that after his plea petitioner, in conversation, indicated that he did not know that he had pleaded or that he was to be sentenced. The brother had not so informed petitioner's attorney (Vol. II, 17-23).

Dr. Gross testified that she treated petitioner for tuberculosis from December, 1962, to February 14, 1963, and prescribed a drug known as Isoniazid. The 325 pills prescribed for petitioner from January to March, 1963, was a standard dosage. Although she had treated several thousand patients with the drug, she had never seen a psychiatric disturbance from this dosage. Petitioner never complained to her of having feelings of giddiness. In February, 1963, she made a note that petitioner appeared depressed but could not really tell because she not seen him often enough (Vol. II, 2-16).

A neurophychiatrist testified that Isoniazid was capable of producing "toxic delirium of the nerves" which could lead to confusion and memory lapses. In answer to a hypothetical question, based on petitioner's testimony that he could not recall pleading guilty and was at times depressed, the doctor said it

was possible that petitioner was suffering from mental abberation at the time he pleaded guilty (Vol. II, 30-32). Another doctor testified that he had administered the drug in thousands of cases, but had observed side effects in only three cases. None of these showed depression, and in each case the side effects were clear (Vol. II, 32-34).

On this record the government moved to dismiss the motion on the ground that petitioner had failed to meet his burden of proof. The court granted the motion, observing that "the case is a tissue of lies from A to Z" (Vol. II, 35). Counsel asked whether the comment was on the record and the court replied that it was (Vol. II, 35).

ARGUMENT

It is evident that petitioner did not sustain his burden of showing that his plea of guilty, entered during trial with the assistance of counsel, was involuntary. The judge was surely justified in refusing to credit petitioner's claim that he was wholly unaware of his actions but nevertheless failed to complain to anyone even when he discovered he was being sent to prison. No doctor supported petitioner's claim. The physician who treated him contradicted his claim that he complained of suffering from the drug. The testimony of the other physicians was not based on any familiarity with petitioner's case and, in any event, offered no significant support for his contentions.

In these circumstances, the finding, by the trial judge that the case was "a tissue of lies" was ade-

quate. It showed that the testimony of petitioner and his witnesses that he did not remember pleading guilty—without which there was absolutely no foundation for the motion—was not credited.[3] If petitioner had seriously wished more specific findings to be made, he could have requested them at the time.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST, 1964

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[3] There is no issue here of the proper standard to determine mental competency. If the testimony of petitioner and his witnesses as to lack of awareness was disbelieved, as it was, there was no testimony to support any claim of mental incompetence under any standard.

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